

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

original

77-1290

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

-against-

ANTHONY RICCO,

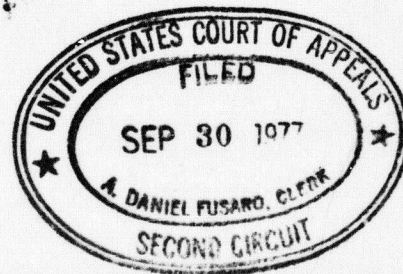
Appellant.

B
P/S

On Appeal From The United States District Court
For The Southern District Of New York

APPELLANT'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

-v-

ANTHONY RICCO,

Appellant.

APPELLANT'S REPLY BRIEF

The primary question in this case is whether there has been a "use". The government, as it must, concedes that Mengrone used the excluded wiretaps and transcripts to refresh his recollection prior to testifying at appellant's trial. (G.B.11).^{*} And it must be remembered that this use of the improperly sealed tapes occurred several years after the conversations. The necessity for this "use" of the wiretaps and transcripts made from them is apparent from the fact that the conversation occurred on October 18, 1973, while Mengrone's recollection was refreshed "a short time prior to his (Ricco's) trial" ("G.B." 11 N.*) Even if Mengrone's recollection was refreshed prior to the January 1976 trial, it is clear that several years had elapsed between the conversation and the use of the wiretaps. There can be no doubt that it was necessary for Mengrone to listen to them to obtain, or add to, his recollection.

The government has put the cart before the horse, for if use of improperly sealed tapes is shown, the burden must be on the government to show freedom from taint, United States v. Huss, 482 F.2d 38 (2d Cir. 1973); United States v. Crouch, 528 F.2d 625, 629 (7th Cir. 1976), just as the burden is on the government to show proper compliance with the sealing provision in the

^{*}"G.B." refers to the government's brief.

first instance. See, United States v. Gigante, 538 F.2d 502 (2d Cir. 1976); People v. Nicoletti, 34 N.Y. 2d 249 (1974); People v. Sher, 38 N.Y. 2d 600 (1976).

The sealing requirement is not a Fourth Amendment exclusionary device, but a statutory safeguard designed to indicate the necessary reliability of evidence, without which no use or disclosure of same may be made in a criminal proceeding. Gigante, supra at 505. The government cites Monroe v. United States, 234 F.2d 49 (D.C. Cir. 1956), cert. denied 355 U.S. 875 (1957), as holding it proper to use tapes of an illegally intercepted communication to refresh recollection. But, in Monroe the violation of the eavesdropping statute at issue went to the manner of interception, not to sealing. Very different interests are at stake where sealing is at issue. Sealing proscribes certain governmental conduct in order to insure the reliability of the evidence and that evidence cannot, pursuant to statute, be used for trial purposes without a seal or satisfactory explanation. In fact, the legislative history cited by the government merely makes it clear that use to refresh recollection is permissible under §2517(3). Obviously this does not effect the necessity of a seal as a prerequisite to any use in a criminal proceeding. §2518(8)(a); C.P.L. §700.65(3); U.S. Code, Cong. Admin. News, 1968 at pp.2188-2189.

Moreover, in United States v. Fury, 554 F.2d 522 (2d Cir. 1977), cert. denied, 21 Cr. L 4095 (June 27, 1977) the government's position was that §2517(1) and (2) had to be interpreted to permit use of unsealed wiretaps to establish probable cause. Any other interpretation, the government argued, would mean that law enforcement officials operating a wiretap could not use the fruits because the tap had not ended and, therefore, was not sealed. This is far different from a use several years after the close of the wiretap and its improper sealing.

Even this Court, in Fury, conceded the issue in that case was not

free from doubt. In fact, prior to Fury, a distinguished jurist in the Southern District of New York noted that establishing probable cause was a use which would violate §2518(8) (a) if "evidence derived therefrom" were to be used at trial. United States v. Caruso, 415 F.Supp 847, 850 n.2 (S.D.N.Y. 1976). Moreover, since sealing goes to the reliability of the tapes (Gigante, supra; Nicoletti, supra) and given the time lapse between interception and use, which greatly heightens the suggestive impact of a tape recording or transcript, the case here is far more offensive to the statutory scheme than the use of tapes to obtain probable cause, which secures clearly independent, probative and reliable evidence. Here, the evidence is not reliable, by statute, and its independence is not free from doubt. Regardless of the actions of defense counsel, the burden is on the government, not the defendant, to show compliance with the statutory sealing provisions. Gigante, supra; Huss, supra. The defendant's or counsel's actions cannot be held to exempt the government from meeting its burden of showing the proper prerequisites to the admissibility of evidence.

The government (G.B. p.18 N.*) misconstrues appellant's alternative request. Ricco does not request a hearing where he would be required to establish taint. All that is requested is that if this court feels that suppression of Mengrone's testimony should not be required upon the record as it stands, that a hearing be granted "for the government to establish the extent of Mengrone's improper use and disclosure." (App. brief p. 14 N.)*

*On page 19 of its brief, the government claims appellant's motion for a severance was "disingenuous". The government omits to indicate that after her testimony at the trial of the other defendants, Georgiana Kunick was called before a federal grand jury as the target of a perjury inquiry. It was this factor, and not disingenuousness by appellant or counsel, which chilled efforts to have Angelo Ricco or Kunick testify. If name-calling is ever appropriate, it is just as appropriate to label the government's action, which did not result in an indictment, as disingenuous as it is to so label appellant's or counsel's action.

CONCLUSION

THE CONVICTION SHOULD BE REVERSED AND
THE CASE REMANDED FOR A NEW TRIAL, OR,
IN THE ALTERNATIVE, A HEARING ON THE
EXTENT OF THE IMPROPER USE OR DISCLOSURE.

Respectfully submitted,

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